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No. 96-1737

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

GORDANA SWANSON,

Petitioner,

vs.

DON KNABE,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court
Of The State Of California

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the California courts violate Swanson's constitutional rights of free speech and petition, by focusing on her status as a rival political candidate rather than on respondent Don Knabe's alleged wrongful conduct?

2. Did the California courts also violate Swanson's due process and jury trial rights by denying her any discovery whatsoever, despite a necessary witness's stated desire to testify and produce documents under subpoena?

3. Is the California SLAPP statute unconstitutional on its face (especially since the New Hampshire Supreme Court has already held that draft legislation modeled on California's statute would in fact be unconstitutional), and should certiorari be granted to resolve the growing conflict among the states on the constitutionality of SLAPP statutes?

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As detailed by Swanson's Petition, this proceeding questions the constitutionality of California's SLAPP statute because of the conflict between a plaintiff's constitutional rights and the abbreviated litigation schedule created by the SLAPP statute. Certiorari is necessary to protect the public's rights of free speech, petition, jury trial and due process in the application of California's new SLAPP statute. *See* Petition at pp. 14-24.

Knabe's opposition brief actually shows why certiorari should be granted, by saying "the California courts focused only in small part on Swanson's 'rival candidate' status." Opposition at p. 8. Whether the California courts focused on Swanson's political status "in small part"

or in large part may be open to dispute, but for the California courts to focus on it at all was a violation of Swanson's constitutional rights, since "the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). *See also NAACP v. Button*, 371 U.S. 415, 430 (1963) ("litigation may well be the sole practicable alternative open to a minority to petition for redress of grievances"); *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907)("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.").

Thus, for the reasons stated below and in Swanson's Petition, certiorari should be granted in order to "secur[e] to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right -- the liberty -- both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth." J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger*, at pp. 90, 99 (1963).

I. THE UNITED STATES SUPREME COURT HAS JURISDICTION

Despite Knabe's arguments, this Court has jurisdiction to grant certiorari since the California courts' application of California's SLAPP statute is unconstitutional, and therefore "repugnant to the Constitution . . . of the United States." 28 U.S.C. §1257(a). Although Knabe says "the appellate court merely ruled on a state procedural issue" (Opposition at pp. 3-4), the appellate decision specifically cites the *Buckley v. Valeo* case to support its ruling (Appendix "E" at p. 17a), showing that certiorari is appropriate because its ruling "was based squarely upon its interpretation of federal law." *Arizona v. Evans*, 514 U.S. __, 115 S.Ct. 1185, 131 L.Ed.2d 34, 43 (1995).

Similarly, although Knabe says "the California Supreme Court did not decide on an important federal question" (Opposition at p. 3), the Ninth Circuit has recently explained that when the California Supreme Court denies a petition for review, it has been given a fair opportunity to review the merits of the petitioner's claim. *Roman v. Estelle*, 917 F.2d 1505, 1506 (9th Cir. 1990). Thus, certiorari is proper under either Supreme Court Rule 10(b) or Rule 10(c).[1/]

II. CERTIORARI SHOULD BE GRANTED ON SWANSON'S FIRST QUESTION PRESENTED, SINCE THE CALIFORNIA COURTS VIOLATED SWANSON'S FREE SPEECH AND PETITION RIGHTS BY FOCUSING ON HER STATUS AS A RIVAL POLITICAL CANDIDATE

As explained in the Petition, the California courts discriminated against Swanson by imposing a more stringent burden on her as a rival political candidate under the SLAPP statute. This violated Swanson's First Amendment rights, including her right of free speech (*Buckley, supra*, 424 U.S. at 15), and her right of access to the courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). *See* Petition at pp. 14-18.

Knabe's Opposition practically concedes to the existence of this constitutional violation by admitting that "the California courts focused . . . on Swanson's 'rival candidate' status" -- albeit supposedly "only in small part." Opposition at p. 8. But despite Knabe's attempt to belittle this constitutional issue, "the constitutional guarantee [of free speech]

[1/] Swanson apologizes for the typographical error on page 2 of her Petition, at which she cites Rule "10(a)" rather than 10(b). This error is pointed out repeatedly by Knabe. *See* Opposition at pp. 2-3, 12.

has its fullest and most urgent application precisely to the conduct of campaigns for political office" (*Buckley, supra*, 424 U.S. at 15), because one of its primary goals is to preserve an "unfettered interchange of ideas for the bringing about of political and social change." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Knabe also cites at page 6 to the California courts' emphasis on Knabe's "fund-raising efforts" as First Amendment activities -- even if they are used to conceal bribes -- but surely it evokes Alice's Wonderland to say that Knabe's right to engage in fund-raising activities somehow trumps Swanson's rights of free speech and access to the courts. Indeed, the Florida Supreme Court has recognized the damages of just such an over-enthusiastic application of SLAPP provisions, since they "seem to extend to [a defendant's] activities a broader protection then the constitution itself provides." *Florida Fern Growers Assn. v. Concerned Citizens of Putnam County,* 616 So.2d 562, 570 (Fla. 1993). Certiorari is appropriate for this reason alone, since "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

The bottom line is that Swanson sued Knabe for taking bribes under the California Political Reform Act, and "[a]ny chilling effect . . . that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms." *Cameron v. Johnson*, 390 U.S. 611, 619 (1968). In this era of intense public interest in questionable political contributions, Swanson should have been allowed to pursue her information and take discovery on whether Knabe was taking bribes as a public official, and so certiorari should be granted to preserve our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co., supra*, 376 U.S. at 270.

III. CERTIORARI SHOULD ALSO BE GRANTED ON SWANSON'S SECOND QUESTION PRESENTED, SINCE THE CALIFORNIA COURTS VIOLATED SWANSON'S DUE PROCESS RIGHTS BY NOT ALLOWING HER TO TAKE ANY DISCOVERY

As Swanson's Petition explains, prior to this litigation Swanson's campaign consultant Ron Smith met with"Dan Wooldridge, the former partner of defendant Don Knabe's campaign consultant Harvey Englander":

> "During these meetings, Mr. Wooldridge told me that Mr. Englander had funneled large sums of money, probably over $25,000 and perhaps as much as $100,000, to Don Knabe by means of phony payments to a dummy company called 'JDK Associates' or 'J.D. Knabe & Associates' controlled by Mr. Knabe's wife, Julie Knabe. Mr. Wooldridge also told me that he had written evidence to back up his statements, and he briefly showed me a copy of a ledger page showing payments to Ms. Knabe's company."

Smith Decl. ¶¶1-2 (AA75). Smith testified that he "tried to obtain a written statement from Mr. Wooldridge to this effect, and . . . also tried to get copies of his supporting documents, but [Mr. Woolridge] told me that he would be willing to respond only to a subpoena." *Id.* *See* Petition at pp. 6-7.

Yet the California courts precluded Swanson from enforcing this subpoena or any other discovery -- discovery which would have allowed her to try to show the alleged bribes which Knabe accepted. This Court has held that a premature dispositive motion cannot be granted without allowing the responding party an opportunity to take

necessary discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (summary judgment case); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) (summary judgment should "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition"). Similarly, Swanson's due process rights were violated by dismissing her claims without allowing her to take any discovery under California's SLAPP statute. *See* Petition at pp. 18-22.

Knabe again tries to minimize the constitutional issue, by claiming that the California "appellate court merely ruled on a state procedural statute -- a subject clearly not worthy of Supreme Court review." Opposition at pp. 3-4. By Knabe's analysis, a Jim Crow statute is also just a "state procedural statute" -- but in any event, what the appellate court <u>really</u> said was that Swanson's claim that "discovery was necessary to oppose Knabe's motion to strike" simply "d[id] not constitute sufficient good cause" to allow her to take that discovery. Petition, Appendix "E" at p. 23a.

Such a ruling directly contradicts this Court's holding in the analogous summary judgment context, that a dispositive motion must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition." *Anderson v. Liberty Lobby, supra*, 477 U.S. at 250 n.5. This rule is especially applicable in a SLAPP context, since SLAPP motions are not generally governed by a summary judgment motion's due process limitations, such as forbidding the trial court from resolving the merits of disputed factual claims. Thus, although SLAPP statutes are designed to protect a defendant's constitutional rights, an overbroad SLAPP procedure "would seem to extend to these activities a broader protection than the constitution itself provides," and would deny a plaintiff her right of "access to the courts." *Florida Fern Growers Ass'n, supra,* 616 So.2d at 570.

Knabe next relies on the California appellate court's statement that supposedly "Swanson could have taken discovery if she had shown good cause and focused her requests to those that would enable her to get over the procedural hurdle." Opposition at p. 9, citing Petition, Appendix "E" at p. 23a. Knabe's argument is disingenuous, since the California court based its ruling on a false premise, *i.e.*, that Swanson's discovery supposedly focused on "an extensive list of, inter alia, communications, bank accounts, campaign contribution records, checks and payments." Petition, Appendix "E" at p. 20a.

Actually, most of Swanson's requested discovery was directed toward three banks, from whom she merely requested "checks," "drafts," and "payments" drawn on Knabe's campaign manager Harvey Englander's or his companies' bank accounts, and made payable to Knabe, his wife, or the two "dummy compan[ies]" named by third-party witness Dan Wooldridge. AA98-99, 106-07, 114-15. It is hard to see how these requests could have been more specifically drafted, since they sought precisely the payment "funneling" information previously identified by Mr. Wooldridge. See above at page 5.

And in any event, it is undisputed that Swanson's "counsel requested leave to take more limited discovery, but his offer was rejected by the Court." AA83-84; *see* Petition at p. 9. The Petition explains in detail how Swanson practically banged her head against the wall by repeatedly requesting leave to take more limited discovery -- only to have the trial court reject her request each and every time. *See* Petition at pp. 7-12.

Knabe finally argues the SLAPP statute could not have violated Swanson's constitutional rights, because "the statute has already withstood at least one comprehensive constitutional challege in the California courts." Opposition at p. 2, citing *Lafayette Morehouse, Inc. v. Chronicle Pub. Co.*, 37 Cal.App.4th 855 (1995). Yet Knabe does not cite a single reported California case which has actually held that a

plaintiff should be allowed to take discovery, or which has reversed a SLAPP dismissal for lack of discovery or other due process reasons, and Swanson is also not aware of any such case.

The simple truth is that even if the California SLAPP statute could be construed to be constitutional, it was used in this case to deprive Swanson of any opportunity to take necessary discovery and therefore violated her due process rights -- and in no reported California case has it ever actually allowed a plaintiff to take her requested discovery. Certiorari should therefore issue because the SLAPP statute is unconstitutional both on its face, and as it was applied by the California courts in this action.

IV. CERTIORARI SHOULD FINALLY BE GRANTED ON SWANSON'S THIRD QUESTION PRESENTED, SINCE IT IS NECESSARY TO RESOLVE A CONFLICT AMONG THE STATE COURTS ABOUT THE CONSTITUTIONALITY OF SLAPP STATUTES

Although Knabe emphasizes the California courts have decided that state's SLAPP statute pretty much meets all constitutional requirements (Opposition at p. 2), the New Hampshire Supreme Court has specifically examined a proposed SLAPP statute modeled on the California version, and found that it would be unconstitutional. *Opinion of the Justices*, 138 N.H. 445, 641 A.2d 1012 (1994).

Knabe says this "decision focuses solely on the New Hampshire State Constitution." Opposition at p. 4. The court did emphasize a plaintiff's right to a jury trial under the New Hampshire Constitution (as explained by Swanson's Petition at p. 22), but the case also dealt with a plaintiff's right of access to the courts (641 A.2d at 1013) -- and Knabe does not dispute that this concern was echoed by the Florida

Supreme Court in its *Florida Fern Growers* case. 616 So.2d at 570.

Certiorari is necessary to resolve this conflict, since "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the . . . state courts concerning the meaning of provisions of federal law." *Braxton, supra*, 500 U.S. at 347. Especially given this Court's statement in the *Liberty Lobby* case that a dispositive motion must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition" (477 U.S. at 250 n.5), certiorari should issue to clarify and resolve this legal conflict between different states.

V. CONCLUSION

Certiorari is necessary to protect a plaintiff's rights under SLAPP statutes, to resolve the conflict between state courts on the constitutionality of SLAPP statutes, to give guidance to courts in dealing with SLAPP statutes across the country -- and also to protect the constitutional rights of an individual, *i.e.*, Swanson. *See New York Times, supra*, 376 U.S. at 269 (recognizing an obligation to preserve "the opportunity for free political discussion to the end that government may be responsive to the will of the people"); *Chambers, supra*, 207 U.S. at 148 ("The right to sue . . . lies at the foundation of orderly government").

Dated: June 1997.

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I certify that on Thursday, June 5, 1997, I served three copies of the REPLY TO BRIEF IN OPPOSITION on all parties required to be served, by depositing such copies in the United States mail, postage prepaid, in envelopes addressed to each of the following:

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